Supreme Court, U. S.
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No. 76-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

THE ADHESIVES AND SEALANT COUNCIL, INC.
THE ADHESIVES MANUFACTURERS ASSOCIATION
NATIONAL CONFECTIONERS TRAFFIC CONFERENCE
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
HERSHEY FOODS CORPORATION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,
Respondents.

JOINT BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., REGULAR COMMON CARRIER CONFERENCE, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. AND MOTOR CARRIERS CENTRAL FREIGHT ASSOCIATION

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OPINION AND DECISION BELOW

The Judgment and Memorandum Opinion of the Court of Appeals are not reported. However, they are attached

as Appendix A to the Petition for a Writ of Certiorari. The Report and Order of the Interstate Commerce Commission (Appendix B of the Petition) are reported at 121 M.C.C. 588.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

We believe that the subject matter for review would be more fairly stated if the following language, set forth in italics, is added to the first question presented:

> Whether motor common carriers, who are required by certificates issued under the Interstate Commerce Act to provide adequate transportation for all commodities *subject to "reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require"* [1] may elect not to handle commodities subject to freezing or to damage from extreme heat, *when at the time of tender such commodities cannot safely be transported because of climatic conditions wholly beyond their ability to control?*

STATUTES INVOLVED

In addition to the statutes set forth by Petitioners, the Commission also relied on Section 204(a)(1) of the Interstate Commerce Act to establish jurisdiction and to make findings. Section 204(c) is added because we make reference to it in our argument *infra*.

Section 204(a)(1) [49 U.S.C. § 304(a)(1)]

(a) It shall be the duty of the Commission—

[1] Excerpted from the text of Section 208(a) of the Interstate Commerce Act, 49 U.S.C. 308(a).

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Section 204(c) [49 U.S.C. § 304(c)]

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

STATEMENT OF THE CASE

This proceeding was instituted by the Commission in response to a petition filed by Travenol Laboratories, Inc., of Deerfield, Illinois, on September 20, 1971. Travenol therein requested an investigation of motor common carrier practices on protective service, asking specifically whether protective service is the required duty of a motor common carrier authorized by the Commission to transport general commodities.

After considering the Travenol petition and statements filed in response to it by shippers and motor carriers and their respective associations, the Commission issued

a Notice of Proposed Rulemaking and Order on May 23, 1972, to determine the responsibilities of all carriers subject to Commission regulation to provide protective service. Nevertheless, the Commission decided that special attention should remain focused upon the responsibilities of general commodity motor common carriers to provide protective service.

Sixteen shippers and organizations of shippers filed initial presentations. Other representations were received from seven motor carriers, six motor carrier associations, three groups representing railroad interests, fourteen tariff associations, and two government agencies, including the Commission's Bureau of Enforcement, which conducted its own investigation of the various carriers.

Upon consideration of its statutory mandate and the record compiled, the Commission found, in its Report served May 7, 1975:

> That the provision of protective services by motor carriers of property subject to Part II of the Act is reasonably adequate; (App. B of Petition, p. A-36)

and it ordered the proceeding discontinued.

In reaching the above-stated finding, the Commission noted that it has ample authority under the provisions of Sections 204, 208(a) and 216(b) of the Act [49 U.S.C. §§ 304, 308(a) and 316(b)] to regulate the service provided by motor common carriers under the terms of their certificates, including conditions and limitations attached thereto. (App. B of Petition, p. A-28) Although urged to do so by several shippers and shipper groups, the Commission declined to use its authority in this general investigatory proceeding to compel each certificated general commodity motor common carrier to purchase one or more units of protective service equipment. (App. B of Petition, p. A-33) Instead, the Commission stated:

> It is impractical in our judgment to measure service adequacy by literally interpreting the term "general commodities" and applying the duty to serve without regard to extreme fluctuations in temperature. To do so would ignore the practicalities of providing transportation services, especially those required of regular route carriers. (App. B of Petition, p. A-33)

Earlier, it specifically concluded:

> Based on the record in this proceeding, we cannot conclude that it is unreasonable or inconsistent with the public interest for general-commodities carriers to elect not to acquire and maintain temperature-control equipment. Accordingly, we believe that it is lawful for them to decline to provide transportation when they are tendered commodities which they cannot transport safely at all times without such equipment. (App. B of Petition, p. A-33)

The Commission also made it clear that in order "to balance the equities in the transportation of commodities under certain adverse and uncontrollable conditions," the criteria first announced in *Mid-Western Motor Freight Traffic Bureau, Inc.* v. *Eichholz*, 4 M.C.C. 755 (1938) would continue to be the measure for protective service by motor common carriers.[2] *Eichholz* "stands for the basic proposition that tariff rules concerning protective services properly may impose a duty on shippers to ascertain the availability of suitable equipment." (App. B of Petition, p. A-31) In other words, "shippers should not expect carriers to have protective equipment available at all times and all places," (*Id.*, at A-32) but when suitable protective equipment is available from a general commodity motor common carrier, that carrier is "ob-

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[2] The quoted language was inadvertently omitted from Petitioners' reprint of the Commission decision at App. B, p. A-35 of Petition. Specifically, the omitted phrase reads ". . . carriers to balance the equities in the transportation of commodities under certain adverse and uncontrollable conditions."

ligated to provide fully its authorized services with respect to commodities that are tendered to it." (*Ibid.*)

Finally, the Commission specifically stated:

> For the reasons given above, we conclude that the *Restrictions* decision does not proscribe publication in the tariffs of motor common carriers of general commodities having no or only limited amounts of temperature-control equipment and facilities, reasonable rules with respect to the services provided. Such rules may impose on shippers a duty to ascertain before tendering a shipment whether suitable equipment is available for the transportation of commodities which are subject to deterioration or damage during periods of temperature extremes. (App. B of Petition, p. A-37)

Petitions for reconsideration were filed by shipper interests, including Petitioners, and were denied by the Commission's Order of September 29, 1975, thereby exhausting the available administrative remedies. A petition for review was then filed with the Court of Appeals which took jurisdiction under 28 U.S.C. §§ 2321 and 2342. That court entered its Judgment and Memorandum Opinion on December 17, 1976, affirming the Commission's decision and orders. (App. A of Petition, pp. A-1 to A-4)

ARGUMENT

In essence, Petitioners claim (1) that the Interstate Commerce Commission, in this proceeding, went beyond the bounds of reasonable construction to create a novel "monstrosity" in statutory interpretation which will have a pervasively adverse effect on shipper and consumers, and (2) that the Court of Appeals refused to review this assertedly erroneous treatment. On their face, these assertions are highly dubious. On close examination, they prove to be totally without merit.

I. The Commission's Statutory Construction Is Not In Error.

In not requiring motor carriers to obtain and maintain temperature-control equipment to meet every conceivable exigency, the Commission has not given a new interpretation to the duty imposed on motor carriers by 49 U.S.C. § 316(b), or any other pertinent provision of the Interstate Commerce Act. Rather, the Commission has based its decision on the well-established principle that while the legal duty of a common carrier to provide reasonably continuous and adequate service approaches that of being absolute, it is not without its exceptions.[3] Nor should it be. The Commission's conclusion that practical limitations militate against requiring motor carriers to assume the sizable financial burden associated with maintaining highly specialized equipment to meet the needs of a relatively small number of shippers is manifestly reasonable and a natural corollary of the *Eichholz* criteria which it affirmed.

Inasmuch as the range of commodities affected is narrow, and the service needs of these shippers arise only relatively infrequently, the financial burden could never be passed on only to those responsible for creating the burden without elevating tariff charges to the point where they effectively embargo the very traffic they seek to have moved. Realistically, therefore, the burden would have

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[3] See, e.g., Restrictions On Service By Motor Common Carriers, 111 M.C.C. 151, 167-168 (1970), quoting from National Furniture Traffic Conf. v. Assoc. Truck, 332 I.C.C. 802, affirmed sub nom., Associated Truck Lines, Inc. v. United States, 304 F. Supp. 1094 (W.D. Mich. 1969), wherein limited exceptions to the duty to serve were recognized. See also Montgomery Ward & Co., Inc. v. Consolidated Freightways, 42 M.C.C. 225, 231 (1942); Quality Drug Stores, Inc. v. Eastern Frt. Ways, 123 M.C.C. 198, 202 (1975). For additional discussion of cases supporting this point, see "Joint Brief of Intervening Respondents," at 15-16, filed May 19, 1976, United States Court of Appeals For The District of Columbia Circuit.

to be borne by the general shipping public. By not requiring every motor carrier to maintain temperature-control equipment sufficient to meet extreme demands, the Commission has effectively avoided the inherent unfairness of burdening the whole, be it shippers or carriers, with the limited concern of but a few;[4] especially in light of the Commission's unchallenged findings that general commodity motor common carriers are providing reasonably adequate service.

It is also important to note that the Commission has never required general commodity motor common carriers to purchase additional equipment to meet exceptional service demands, and has allowed such carriers to place limitations upon services contemplated under the terms of their certificates where it is manifestly reasonable to do so.[5] Thus, contrary to Petitioners' claim that there is something new and erroneous in the Commission's statutory construction, the approach taken merely reflects the position the Commission has consistently maintained.

The so-called "election privilege" is considerably more restricted than Petitioners would have the Court believe. It pertains *only* to a specific type of specialized equipment, rather than to an undefinable group of commodities. Thus, contrary to Petitioners' cleverly chosen language, it is circumscribed severely. In addition, it does not, as the Court of Appeals ascertained, prevent shippers from bringing a complaint before the Commission against particular motor carriers when such carriers have unreasonably withheld service. (See 49 U.S.C. § 304(c)) And further, the proven application procedures for new motor carrier authority, including temporary authority and emergency temporary authority, are also available to all

[4] Based on the facts, which are unchallenged by Petitioners, the Commission stated essentially the same conclusion. See App. B of Petition, p. A-33.

[5] See Restrictions case, supra, at 161.

shippers. These procedures more than adequately accommodate any need for additional service.

In conclusion, Petitioners' failure to obtain the changes sought did not result from the Commission's application of an erroneous statutory construction; rather it is based upon the lack of justification for the sweeping and impractical remedies they proposed.

II. The Court Below Did Not Err In Its Rejection Of Petitioners' Appeal.

A fair reading of the Memorandum Opinion indicates that, if fault is to be assigned for the failure of Petitioners to obtain the relief they desired on appeal, that fault lies with Petitioners themselves and not with the court below. In light of Petitioners' refusal to challenge the validity of the *Eichholz* criteria upon which the Commission's equipment decision is implicitly grounded, and given Petitioners' inability to clearly articulate exactly what relief they were seeking from the lower court, no other result could have been forthcoming.

Contrary to Petitioners' claim, the lower court did review the Commission's statutory interpretation in the administrative proceeding. The court below determined that the crux of Petitioners' assertion of error on appeal was based on their belief that the claim brought against particular motor common carriers would be rejected *ab initio* by the Commission by reference to the language (i.e., statutory interpretation) in its opinion. To this the lower court replied:

> [It] does not read the Commission's opinion as meaning that under no circumstances would it entertain for investigation and appropriate action a complaint that a particular common carrier is unreasonably and arbitrarily failing to supply the service required of it by the statute and terms of its certificated authority. (App. A of Petition, p. A-4)

To reach this conclusion, the lower court obviously considered the propriety as well as the parameters of the Commission's statutory construction. If the review made of the statutory construction was narrow in its scope, such narrowness resulted from Petitioners' presentation of the issue and not from the lower court's neglect of it.

In any case, the lower court appears to have done all that was required of it given Petitioners' inability to demonstrate that any harm would befall them from affirmation of longstanding Commission policy. Doubtlessly, the fact that Petitioners did not dispute the Commission's finding that the motor carrier service presently being provided is "reasonably adequate" was also viewed as strongly indicative that no harm would result from the Commission's decision.

Finally, inasmuch as Petitioners failed to demonstrate that they will suffer injury, their reference to *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), and other related cases, is inapposite.

CONCLUSION

We respectfully submit, therefore, that Petitioners present no substantial question for the decision of this Court, and that the judgment and decree of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for Respondent, American Trucking Associations, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of April, 1977, I served copies of the foregoing Brief in Opposition on the several parties hereto, as follows:

1. On The Adhesives And Sealant Council, Inc.; The Adhesives Manufacturers Association; National Confectioners Traffic Conference; National Paint And Coatings Association, Inc.; National Small Shipments Traffic Conference, Inc.; and Hershey Foods Corporation, Petitioners, by mailing copies in duly addressed envelopes, with postage prepaid, to their counsel of record, Charles J. McCarthy and Daniel J. Sweeney, 1750 Pennsylvania Avenue, N.W., Washington, D.C. 20006.

2. On the United States of America, Respondent, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Lloyd John Osborn, Solicitor General; Department of Justice, Washington, D.C. 20530; and Honorable Earl J. Silbert, United States Attorney For The District of Columbia, United States Courthouse, 3rd and Constitution Avenue, N.W., Washington, D.C. 20001.

3. On the Interstate Commerce Commission, Respondent, by mailing copies, in duly addressed envelopes, with postage prepaid, to Mark L. Evans, Esq., its General Counsel and Frederick W. Read, Esq., Attorney, at the offices of the Commission, Washington, D.C. 20423.

NELSON J. COONEY